

1 **UNITED STATES COURT OF APPEALS**  
2 **FOR THE SECOND CIRCUIT**

3  
4 August Term 2013

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6  
7 Argued: December 4, 2013  
8 Decided: July 15, 2014

9  
10 No. 12-4174-cv

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12  
13  
14 **TECHNOMARINE SA,**  
15 *Plaintiff-Appellant,*

16  
17 -v-

18  
19 **GIFTPORTS, INC., a New York Corporation,**  
20 *Defendant-Appellee,*

21  
22 **DOES 1 THROUGH 10,**  
23 *Defendants.*  
24

25  
26 Before: LIVINGSTON and LOHIER, *Circuit Judges*, and STEIN, *District Judge*.\*

27  
28 Appeal from a September 10, 2012, order of the United States District Court  
29 for the Southern District of New York (Batts, J.), granting the Defendant-Appellee's

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1 \* The Honorable Sidney H. Stein, of the United States District Court for the Southern  
2 District of New York, sitting by designation.

1 motion to dismiss. We consider whether an earlier litigation between the parties  
2 resolving, *inter alia*, claims of trademark infringement, bars the present suit over  
3 similar conduct occurring after the date of the settlement agreement that concluded  
4 the first litigation. We determine that Plaintiff-Appellant’s claims arising after the  
5 first litigation are not barred by *res judicata*. Nonetheless, we affirm the order of the  
6 district court on the basis of its alternate holding that Plaintiff-Appellant failed to  
7 state a claim on which relief may be granted. Further, we affirm the district court’s  
8 denial of Plaintiff-Appellant’s request for leave to amend its complaint a second time  
9 because Plaintiff-Appellant failed to indicate how further amendment would permit  
10 it to cure the deficiencies in the First Amended Complaint.

11  
12 AFFIRMED.

13 BRENT HERBERT BLAKELY, Blakely Law Group,  
14 Hollywood, CA, *for Plaintiff-Appellant*.

15  
16 WILLIAM THOMASHOWER (Rachel Schwartz, Carla  
17 Sereny, *on the brief*), Schwartz & Thomashower LLP,  
18 New York, NY, *for Defendant-Appellee*.

19  
20 DEBRA ANN LIVINGSTON, *Circuit Judge*:

21 We consider whether a prior litigation between the parties resolving claims  
22 of trademark infringement and other unfair business practices, and stemming from  
23 earlier conduct, bars the present suit of Plaintiff-Appellant TechnoMarine SA  
24 (“TechnoMarine” or “Plaintiff”) over similar conduct that occurred after the  
25 settlement of the earlier suit. The district court (Batts, *J.*) granted a motion to dismiss  
26 by Defendant-Appellant Giftports, Inc. (“Giftports” or “Defendant”), holding that  
27 TechnoMarine’s claims are barred by *res judicata* and, in the alternative, that

1 TechnoMarine has failed to state a claim. The district court denied Plaintiff leave to  
2 amend its complaint a second time on the ground that it would be futile in light of  
3 the *res judicata* bar. We conclude that *res judicata* does not bar the alleged trademark  
4 and other unfair business practice claims that arose *after* the original settlement  
5 agreement between the parties. Nonetheless, we affirm the dismissal of the  
6 complaint on the basis of the district court's alternate holding that TechnoMarine  
7 has failed to state a claim upon which relief may be granted. We also affirm the  
8 district court's denial of Plaintiff's request to amend its complaint because Plaintiff  
9 has failed to indicate how further amendment would cure its pleading deficiencies.

## 10 BACKGROUND<sup>1</sup>

### 11 A. Parties

12 TechnoMarine is a Swiss designer, manufacturer, and distributor of watches,  
13 and it holds various trademark and copyright registrations for its word mark, logo,  
14 and watch dial. TechnoMarine has sold hundreds of millions of dollars of watches

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1 <sup>1</sup> The factual background presented here is drawn from the allegations of  
2 TechnoMarine's First Amended Complaint, which we accept as true for the purposes of our  
3 review of a motion to dismiss, *see Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 107 (2d  
4 Cir. 2012), and from TechnoMarine's Second Amended Complaint and settlement  
5 agreement in *TechnoMarine SA v. Giftports Inc., et al.*, No. 08-Civ-10911 (S.D.N.Y. filed  
6 December 20, 2008).

1 globally. TechnoMarine closely controls distribution and sale of its watches through  
2 authorized dealer agreements that expressly prohibit dealers from transshipping  
3 and selling TechnoMarine watches to unauthorized third-party retailers.

4 Giftports is a New York corporation that sells premium brand watches at  
5 discounted prices on the internet. Giftports is not an authorized retailer for  
6 TechnoMarine watches but, nonetheless, Giftports has “purchased, advertised,  
7 offered for sale, and/or sold watches bearing the TechnoMarine marks on its  
8 website.”

#### 9 **B. Prior Litigation and Settlement**

10 In December 2008, TechnoMarine brought a prior suit against Giftports in the  
11 District Court for the Southern District of New York (Kaplan, *J.*). In March 2009,  
12 TechnoMarine filed a second amended complaint in that case, bringing three causes  
13 of action:

- 14 1. Copyright infringement under 17 U.S.C. § 101 *et seq.*, based on  
15 Giftports’s alleged unauthorized use of photographs of  
16 TechnoMarine brand watches;  
17
- 18 2. Unfair competition under the Lanham Act, 15 U.S.C. § 1125(a),  
19 based on allegations that Giftports intended purchasers to  
20 believe it was “an authorized source for TechnoMarine watches”  
21 and that Giftports was selling TechnoMarine watches “without  
22 the benefit of the warranty and after sales service that  
23 TechnoMarine provide[s] for such products”; and

1           3.     Alleged interference with TechnoMarine’s contractual relations  
2                     with “authorized retailers and/or distributors.”  
3

4           The parties resolved this earlier case through a “Litigation Settlement  
5 Agreement and Mutual Release” (“Settlement Agreement”) that was executed on  
6 April 24, 2009. Pursuant to the Settlement Agreement, the parties submitted to the  
7 district court a stipulation of dismissal with prejudice, which was entered on April  
8 27, 2009.

9           In the Settlement Agreement, Giftports agreed to pay TechnoMarine \$5,000  
10 and TechnoMarine agreed to dismiss the action with prejudice. Giftports  
11 represented in the Settlement Agreement that it had “ceased all use of any copies of  
12 Plaintiff’s Copyrighted Work . . . at least as of January 16, 2009.”<sup>2</sup> The Settlement  
13 Agreement made clear that it should not be construed “as a license, implied or  
14 otherwise, by and between Plaintiff and Defendant to use the Copyrighted Work.”

15           Giftports denied any intentional infringement of TechnoMarine’s rights in the  
16 Settlement Agreement, and the agreement was altogether silent as to whether the  
17 conduct alleged by TechnoMarine was unlawful. Neither party admitted liability  
18 or wrongdoing. The agreement’s release of liability was broad and unqualified,

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1                     <sup>2</sup> “Copyrighted Work” was defined in the agreement to denote “Copyright  
2 Registration No. TX 6-857-826 for the 2008 Online TechnoMarine Watch Catalog.”

1 providing that the parties agreed, in pertinent part, to:

2 release . . . one another . . . from any and all liability, . . . causes of  
3 action, suits or obligations of any nature, . . . whether known or  
4 unknown, . . . which the parties . . . now have, may have or may  
5 hereafter assert against one another, relating to the claims alleged in the  
6 Civil Action or arising from the facts alleged therein . . . .

7  
8 J.A. 70.

9 **C. Present Litigation**

10 More than two and a half years after the 2009 settlement, TechnoMarine  
11 brought the present action against Giftports.<sup>3</sup> In its First Amended Complaint, filed  
12 in April 2012, TechnoMarine asserted six causes of action:

- 13 1. Trademark infringement, pursuant to 15 U.S.C. § 1114;
- 14
- 15 2. False designation of origin, pursuant to 15 U.S.C. § 1125(a);
- 16
- 17 3. Trademark dilution, pursuant to 15 U.S.C. § 1125(c);
- 18
- 19 4. Tortious interference with contractual relations;
- 20
- 21 5. Common law unfair competition; and
- 22
- 23 6. Copyright infringement, pursuant to 17 U.S.C. § 501.
- 24

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1 <sup>3</sup> TechnoMarine filed its initial complaint in this second action on December 28, 2011.  
2 On March 28, 2012, Giftports moved to dismiss pursuant to Federal Rule of Civil Procedure  
3 12(b)(6). Rather than responding to this motion to dismiss, TechnoMarine filed an  
4 amended complaint, dated April 19, 2012.

1 The conduct alleged to be unlawful, according to TechnoMarine's amended  
2 complaint in this case, is similar to the conduct that TechnoMarine alleged to be  
3 unlawful in its first, previously settled lawsuit. The gravamen of TechnoMarine's  
4 complaint in this case is that Giftports – although not an authorized retailer –  
5 purchased and sold watches bearing TechnoMarine marks on its website. The  
6 complaint alleges that it is “reasonable to conclude” that these watches are “either  
7 counterfeit” or they were “obtained from entities who are [contractually] prohibited  
8 from selling” these watches to Giftports. These allegations are, in substance,  
9 additional instances of the same type of conduct alleged in the litigation settled in  
10 2009. Nonetheless, the First Amended Complaint in the present case inexplicably  
11 fails to mention the previous lawsuit and settlement. Further, it does not distinguish  
12 between conduct that occurred prior to, as compared to following, the previous  
13 litigation between the parties.

14 Giftports moved in the district court to dismiss TechnoMarine's First  
15 Amended Complaint in May 2012. TechnoMarine opposed the motion; additionally,  
16 it requested leave to amend “[i]n the event [the district court found] that Plaintiff's  
17 allegations are insufficient to sustain any of its claims.” In September 2012, the  
18 district court granted the motion to dismiss, holding that Plaintiff's claims are barred

1 by *res judicata* due to TechnoMarine’s 2009 lawsuit and settlement. It alternatively  
2 held, under Rule 12(b)(6), that TechnoMarine failed to state a valid cause of action  
3 for any of its claims. The district court also denied Plaintiff’s request for leave to  
4 amend its complaint a second time, ruling that any amendment would be futile in  
5 light of the district court’s *res judicata* holding. Judgment was entered on September  
6 18, 2012, and TechnoMarine filed this timely appeal.

## 7 DISCUSSION

8 We review *de novo* the dismissal of a complaint under Rule 12(b)(6), accepting  
9 all allegations in the complaint as true and drawing all inferences in favor of the  
10 plaintiff. *Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013). Our review of a district  
11 court’s application of *res judicata* is also *de novo*. *Duane Reade, Inc. v. St. Paul Fire &*  
12 *Marine Ins. Co.*, 600 F.3d 190, 195 (2d Cir. 2010). A court may consider a *res judicata*  
13 defense on a Rule 12(b)(6) motion to dismiss when the court’s inquiry is limited to  
14 the plaintiff’s complaint, documents attached or incorporated therein, and materials  
15 appropriate for judicial notice. *See, e.g., Day v. Moscow*, 955 F.2d 807, 811 (2d Cir.  
16 1992) (“[W]hen all relevant facts are shown by the court’s own records, of which the  
17 court takes notice, the defense [of *res judicata*] may be upheld on a Rule 12(b)(6)  
18 motion without requiring an answer.”).



I.

1  
2           “Under the doctrine of *res judicata*, or claim preclusion, a final judgment on  
3 the merits of an action precludes the parties or their privies from relitigating issues  
4 that were or could have been raised in that action.” *St. Pierre v. Dyer*, 208 F.3d 394,  
5 399 (2d Cir. 2000) (quoting *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398  
6 (1981)) (brackets and internal quotation marks omitted). “To prove the affirmative  
7 defense [of *res judicata*] a party must show that (1) the previous action involved an  
8 adjudication on the merits; (2) the previous action involved the plaintiffs or those in  
9 privity with them; [and] (3) the claims asserted in the subsequent action were, or  
10 could have been, raised in the prior action.” *Monahan v. N.Y.C. Dep’t of Corr.*, 214  
11 F.3d 275, 285 (2d Cir. 2000).

12           The first two elements of this test are satisfied and are not in dispute here.<sup>4</sup>  
13 The only issue in this appeal is the third element – whether “the claims asserted” in  
14 this action “were, or could have been, raised in the prior action.” *Monahan*, 214 F.3d  
15 at 285. Whether a claim that was not raised in the previous action could have been  
16 raised therein “depends in part on whether the same transaction or connected series

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1           <sup>4</sup> The earlier litigation was between the same two parties and was resolved in 2009  
2 by a settlement agreement, which is generally considered a judgment on the merits. *See*  
3 *Greenberg v. Bd. of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 168-70 (2d Cir. 1992).

1 of transactions is at issue, whether the same evidence is needed to support both  
2 claims, and whether the facts essential to the second were present in the first.”  
3 *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992) (internal quotation marks  
4 omitted). To determine whether two actions arise from the same transaction or  
5 claim, we consider “whether the underlying facts are related in time, space, origin,  
6 or motivation, whether they form a convenient trial unit, and whether their  
7 treatment as a unit conforms to the parties’ expectations or business understanding  
8 or usage.” *Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001) (internal quotation marks  
9 omitted).

10 When analyzing whether a claim is based on the same transaction or  
11 occurrence, courts must be mindful that a claim “arising subsequent to a prior action  
12 . . . [is] not barred by *res judicata*” even if the new claim is “premised on facts  
13 representing a continuance of the same ‘course of conduct.’” *Storey v. Cello Holdings,*  
14 *L.L.C.*, 347 F.3d 370, 383 (2d Cir. 2003). This is because, as the Supreme Court has  
15 directed:

16 That both suits involved ‘essentially the same course of wrongful  
17 conduct’ is not decisive. Such a course of conduct . . . may frequently  
18 give rise to more than a single cause of action. . . . While the [prior]  
19 judgment precludes recovery on claims arising prior to its entry, it  
20 cannot be given the effect of extinguishing claims which did not even

1 then exist and which could not possibly have been sued upon in the  
2 previous case.

3  
4 *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327-28 (1955).

5 We have explained that this “unremarkable principle” can be complicated by  
6 the “at-times-difficult determination of what degree of conduct” following the first  
7 judgment is necessary to give rise to a new “claim.” *Storey*, 347 F.3d at 383. As  
8 relevant here, our precedent provides two categories of cases where post-judgment  
9 conduct constitutes a new claim falling outside the parameters of claim preclusion.

10 The first category is straightforward: when post-judgment conduct is  
11 sufficient to state a cause of action on its own – without the need to incorporate facts  
12 that preceded the first suit – the later course of conduct underlying the second suit  
13 gives rise to a new cause of action that is not barred by *res judicata*. See *Storey*, 347  
14 F.3d at 384 (“Where the facts that have accumulated after the first action are enough  
15 on their own to sustain the second action, the new facts clearly constitute a new  
16 ‘claim,’ and the second action is not barred by *res judicata*.”).

17 We have, therefore, held that a settlement for fraud in the sale of securities  
18 from 1975 to 1979 “is not the same as the claim that [the defendant] defrauded  
19 customers in the sale, purchase, and repurchase of other securities” in later years.

1     *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996). Similarly, we have  
2     held that suits over later breaches of contract, financial transactions, and ship  
3     voyages are not barred by claim preclusion, even if the plaintiffs previously brought  
4     suit over earlier instances of this same conduct. *See Prime Mgmt. Co. v. Steinegger*,  
5     904 F.2d 811, 816 (2d Cir. 1990) (prior action did not preclude later suit regarding  
6     breaches of contract that occurred subsequent to the filing of a prior suit); *see also*  
7     *Greenberg*, 968 F.2d at 168-70 (prior actions regarding earlier financial transactions  
8     did not preclude later suit over later financial transactions); *Interoceanica Corp. v.*  
9     *Sound Pilots, Inc.*, 107 F.3d 86, 90-91 (2d Cir. 1997) (prior suit regarding pilots' fees  
10    in previous voyages did not preclude a subsequent suit regarding pilots' rights in  
11    ocean voyages occurring after those underlying the first suit).

12           “Claims arising subsequent to a prior action,” based on conduct occurring  
13    after the commencement of the earlier suit, and sufficient to state a cause of action  
14    without the need to incorporate facts preceding the first suit “need not, and often  
15    perhaps could not, have been brought in that prior action,” and so are not barred by  
16    *res judicata* “regardless of whether they are premised on facts representing a

1 continuance of the same ‘course of conduct.’” *Storey*, 347 F.3d at 383.<sup>5</sup> To be clear,  
2 when a defendant commits repeated acts, each of which can independently support  
3 a cause of action, claim preclusion principles *will* require plaintiffs seeking relief as  
4 to all of the defendant’s conduct to bring together the causes of action that have  
5 already arisen when the litigation commences, provided that such acts are based on  
6 the same connected series of transactions. Thus, if a party sues for a breach of  
7 contract, “*res judicata* will preclude the party’s subsequent suit for any claim of  
8 breach that had occurred *prior* to the first suit.” *Prime Mgmt.*, 904 F.2d at 816

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1 <sup>5</sup> Our decision in *Berlitz Schools of Languages of America, Inc. v. Everest House*, 619 F.2d  
2 211 (2d Cir. 1980), is not to the contrary. There, in a dispute between the Berlitz Schools of  
3 Languages and Charles Berlitz, a grandson of the Schools’ founder, the plaintiffs obtained  
4 a state court judgment against Charles Berlitz and the other defendants declaring that the  
5 defendants could not use the name Berlitz as part of the name of a foreign language  
6 teaching text or as part of the name of a publishing company preparing foreign language  
7 materials, but that Charles Berlitz could identify himself as the editor or author of foreign  
8 language materials, so long as he made it clear that he was not connected with plaintiffs.  
9 *Id.* at 213. In a subsequent suit, the state court rejected the plaintiffs’ claim that Charles  
10 Berlitz had violated the declaratory judgment when he listed himself as an author of a  
11 foreign language textbook and included the disclaimer that “[s]ince 1967, Mr. Berlitz has  
12 not been connected with the Berlitz Schools in any way.” *Id.* at 214. This Court  
13 determined, in a subsequent litigation involving another set of instructional books with a  
14 substantially identical use of the Berlitz name and disclaimer, that the district court had  
15 properly granted summary judgment. *Id.* at 215. Although we cited both *res judicata* and  
16 collateral estoppel principles, our decision, properly read, rested on collateral estoppel:  
17 that given the “minuscule” differences between “the legend of Charles Berlitz’s name and  
18 the disclaimer” on the new series as opposed to the legend and disclaimer on the preceding  
19 one, “there [were] no issues with respect to plaintiffs’ [federal] claims which ha[d] not been  
20 determined” in the earlier state proceedings. *Id.* at 215-16.

1 (emphasis added). *Res judicata* will not, however, “bar a subsequent suit for any  
2 breach that had not occurred when the first suit was brought.” *Id.*; see also  
3 Restatement (Second) of Judgments § 24 cmt. d (1982) (“When a person trespasses  
4 daily upon the land of another for a week, although the owner of the land might  
5 have maintained an action each day, such a series of trespasses is considered a unit  
6 up to the time when action is brought. Thus if in the case stated the landowner were  
7 to bring suit on January 15, including in his action only the trespass on January 10,  
8 and obtain a judgment, he could not later maintain an action for the trespasses on  
9 January 11 through January 15.”). “If a defendant engages in actionable conduct  
10 after a lawsuit is commenced, the plaintiff may seek leave to file a supplemental  
11 pleading [under Rule 15(c)] to assert a claim based on the subsequent conduct.”  
12 *First Jersey Sec.*, 101 F.3d at 1464. But the plaintiff “is not required to do so, and his  
13 election not to do so is not penalized by application of *res judicata* to bar a later suit  
14 on that subsequent conduct.” *Id.*

15 That brings us to the second type of case in which we have analyzed whether  
16 conduct relating to but occurring after commencement of an earlier litigation gives  
17 rise to a new claim so as to fall outside the parameters of *res judicata*. When a  
18 subsequent action involves a claim over “ongoing conduct” and it relies on facts that

1 occurred both before and after the earlier action commenced, claim preclusion will  
2 not bar a suit, we have said, “based upon legally significant acts occurring *after* the  
3 filing of a prior suit that was itself based upon earlier acts.” *Waldman v. Village of*  
4 *Kiryas Joel*, 207 F.3d 105, 113 (2d Cir. 2000). Our case law provides guidance as to  
5 what acts are “legally significant.”

6 In *Waldman*, the plaintiff, in his earlier action (“*Waldman I*”), sued the Village  
7 of Kiryas Joel, New York, for discriminatory enforcement of the zoning code and  
8 constitutional violations related to the provision of public housing.<sup>6</sup> *Id.* at 107. In  
9 the plaintiff’s later action, in which he accused the Village of “excessive  
10 entanglement with religion” and argued that “the Village government is little more  
11 than an extension of the Congregation Yetev Lev . . . , the dominant religious body  
12 in the Village,” *Waldman* sought dissolution of the Village under the Establishment  
13 Clause. *Id.* at 107-08. *Waldman*’s later suit (brought only a few months after the  
14 settlement in *Waldman I*) relied on allegations of conduct taking place *before* the  
15 earlier action was commenced, in addition to some new post-settlement conduct.

16 As we have said, “claim preclusion may apply where some of the facts on

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1 <sup>6</sup> In fact, two prior related suits had been filed against the Village. Because  
2 *Waldman* was not a plaintiff in the first action, the *Waldman* Court referred to the second  
3 of these suits as “*Waldman I*.” The two earlier actions in *Waldman* were settled jointly.

1 which a subsequent action is based post-date the first action but do not amount to  
2 a new claim.” *Storey*, 347 F.3d at 384. In *Waldman*, we determined that:

3 it is simply not plausible to characterize Waldman’s claim as one based  
4 in any significant way upon the post-*Waldman I* facts. The new  
5 allegations made in the present complaint do not, either by themselves  
6 or to any degree not already demonstrated by the overlapping facts,  
7 establish the sort of pervasive and otherwise irremediable  
8 entanglement between church and state that would justify a drastic  
9 remedy like the dissolution of the Village. . . . We conclude that, in  
10 seeking the dissolution of [the Village], Waldman has based his action  
11 principally upon the common nucleus of operative facts shared with  
12 *Waldman I*.

13 *Waldman*, 207 F.3d. at 113. Accordingly, we held that the facts post-dating the first  
14 action did “not create a ‘new’ cause of action that did not exist when the prior suits  
15 were brought” and that Waldman’s Establishment Clause claim was barred by *res*  
16 *judicata*. *Id.* at 112. We expressly noted, however, that this was not to hold “that a  
17 series of future actions evincing an enduring and all-encompassing domination of  
18 the Village government by the Congregation could not at some point suffice to  
19 create a *new* cause of action for the dissolution of the Village.” *Id.* at 113. “[A]t some  
20 point,” as we said, “repetition of the same or similar acts” may result in a later claim,  
21 “based, as it would be, primarily upon a cumulation of events occurring after the  
22 first suit.” *Id.* at 114. But Waldman could not “use the mere inclusion of a few post-



1 *Waldman I* Village acts . . . to resurrect a claim, grounded almost entirely upon . . .  
2 events [preceding the prior litigation].” *Id.*

3 II.

4 Applying the framework that these cases establish, we conclude that the  
5 district court erred in its application of claim preclusion principles. Little aided by  
6 TechnoMarine’s inartful complaint (which fails to allege when particular conduct  
7 occurred or to differentiate between pre- and post-settlement conduct), the district  
8 court failed to consider whether TechnoMarine alleges *new* conduct occurring after  
9 the settlement that is sufficient to state one or more new causes of action.<sup>7</sup> Because  
10 we conclude that at least as to its trademark infringement claim, TechnoMarine’s  
11 complaint is properly read at this stage of the litigation to assert liability based on  
12 *new*, post-settlement conduct, this claim, and perhaps others, are “not barred by *res*  
13 *judicata*” even though “premised on facts representing a continuance of the same

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1 <sup>7</sup> As we have said, the *res judicata* bar is normally inoperative with regard to the  
2 defendant’s actionable conduct occurring after an earlier suit *commences*, provided that the  
3 plaintiff does not act to bring post-commencement claims within the scope of his earlier  
4 suit. *See First Jersey Sec.*, 101 F.3d at 1464. Here, however, the parties’ Settlement  
5 Agreement brings within its ambit (and thus the ambit of the first litigation) claims existing  
6 as of the date of settlement and arising from the facts alleged in the original complaint. *See*  
7 *Greenberg*, 968 F.2d at 169 (noting that a settlement agreement “can only have the preclusive  
8 [e]ffect that the parties to the settlement intended to give it”). Thus, the operative date for  
9 *res judicata* purposes is the date of the settlement.

1 'course of conduct.'" *Storey*, 347 F.3d at 383.

2 TechnoMarine's trademark infringement claim is not barred by claim  
3 preclusion because Giftports allegedly committed new instances of trademark  
4 infringement after the settlement, so that the present claim, to the extent based on  
5 the new acts of infringement, was not and could not have been litigated in the earlier  
6 proceeding. As noted in the district court's opinion, TechnoMarine, in its opposition  
7 to Giftports's motion to dismiss, argued that the present action "involves  
8 infringements on [its] 2010/2011 line of watches." Although the complaint does not  
9 provide dates for the allegedly infringing conduct, drawing all inferences in  
10 TechnoMarine's favor, as we must do on review of a motion to dismiss, the  
11 complaint is fairly read to allege a course of conduct by Giftports that was ongoing  
12 as of April 19, 2012, the date of the complaint. Because TechnoMarine's complaint  
13 alleges supposedly unlawful conduct involving the 2010/2011 line of watches, which  
14 would have occurred after the 2009 settlement and judgment, TechnoMarine can  
15 support a claim for trademark infringement of the 2010/2011 line of watches based  
16 on the new allegedly infringing conduct. As a result, this cause of action is not

1 barred by claim preclusion.<sup>8</sup>

2 The district court's misapplication of claim preclusion principles may have  
3 resulted from a misreading of our decision in *Waldman*. There, we noted in passing  
4 that the plaintiff in that case asserted "nothing more than additional instances of  
5 what was previously asserted." *TechnoMarine S.A. v. Giftports, Inc.*, No. 11 Civ.  
6 9643(DAB), 2012 WL 3964734, at \*5 (S.D.N.Y. Sept. 10, 2012) (citing *Waldman*, 207  
7 F.3d at 113); see also *Marcel Fashions Grp. Inc. v. Lucky Brand Dungarees, Inc.*, No. 11  
8 Civ. 5523(LTS), 2012 WL 4450992, at \*4 (S.D.N.Y. Sept. 25, 2012) (citing *Waldman*, 207  
9 F.3d at 113). But *Waldman* did not hold that claims that are based on conduct that  
10 takes place after an earlier litigation are barred by *res judicata* simply because the  
11 conduct is similar to prior acts that took place before the earlier litigation. Our  
12 precedent makes clear that if the later conduct can support a cause of action on its

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1 <sup>8</sup> Any claim for trademark infringement occurring *before* the settlement of the 2009  
2 litigation, however, is barred by *res judicata* because it either was or could have been  
3 brought in the first litigation. But the fact that the complaint includes allegations of pre-  
4 judgment conduct, which are barred, does not mean the allegations of post-judgment  
5 infringing conduct are also barred. As for TechnoMarine's causes of action for trademark  
6 dilution, false designation of origin, tortious interference, and unfair competition, these  
7 causes of action, too, are not precluded if based on either: (1) new facts sufficient to state  
8 a claim on their own without the need to incorporate facts that preceded the first suit; or  
9 (2) "legally significant acts" such that the later claim represents a new cause of action, even  
10 if based to some degree on earlier conduct. Given our conclusion, *infra*, that the complaint  
11 was properly dismissed on alternative grounds, we need not decide whether these claims  
12 are barred.

1 own, it is the basis of a new cause of action not precluded by the earlier judgment.

2 The contrary conclusion – that a plaintiff such as TechnoMarine *is* precluded  
3 from bringing suit for alleged *new* trademark violations because the parties  
4 previously settled a suit over earlier, similar conduct – violates basic claim  
5 preclusion principles. A simple hypothetical may help explain this point. Assume  
6 that a plaintiff sues a defendant for trademark infringement occurring from 2010 to  
7 2012. After trial, the court grants the plaintiff judgment and money damages. Two  
8 years following this judgment, in 2014, the defendant again infringes upon the same  
9 trademark, and in a similar way. Under Giftports’s reasoning, claim preclusion  
10 would prohibit the plaintiff from suing again. The earlier judgment against the  
11 defendant – determining that it violated plaintiff’s trademark rights from 2010 to  
12 2012 – would in effect immunize the defendant against all suits concerning  
13 infringements of the same trademark in a similar way. This is not the law of claim  
14 preclusion.

15 Giftports nonetheless asserts that TechnoMarine’s claims should be precluded  
16 here for two reasons. First, Giftports argues that the Settlement Agreement between  
17 the parties prohibits this suit. Second, Giftports posits that TechnoMarine’s request  
18 for, and failure to obtain, an injunction has preclusive effect. Neither argument is

1 persuasive.

2 First, the prior settlement between the parties does not preclude this suit. A  
3 settlement, just like a judgment, does not ordinarily bar claims that have not yet  
4 accrued. The parties could *agree* to extinguish future claims, but TechnoMarine and  
5 Giftports did no such thing here. They agreed only to release liability “relating to  
6 the claims alleged in the Civil Action or arising from the facts alleged therein.” The  
7 stipulation of dismissal in this case, moreover, made clear that it did not extinguish  
8 claims that did not yet exist. J.A. 75, 187 (“[A]ll claims that were or could have been  
9 asserted [in this action] shall be dismissed with prejudice . . .”). The Settlement  
10 Agreement is silent as to future conduct by either party that may violate the same  
11 statutory or common law rights. But it does make clear that it is not a license for  
12 Giftports to use TechnoMarine’s intellectual property in the future.

13 Giftports’s second argument – that TechnoMarine should be precluded from  
14 suing over future conduct because it failed to obtain an injunction prohibiting this  
15 future conduct – is also unavailing. Courts may deny requests for injunctive relief,  
16 an equitable remedy, for various reasons unrelated to the validity of the plaintiff’s  
17 claim. For example, a request for an injunction will be denied when remedies  
18 available at law, such as monetary damages, are adequate to compensate for the

1 injury, or the public interest would be disserved by a permanent injunction. *See*  
2 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A district court may deny  
3 injunctive relief, moreover, when there is little evidence of likelihood of future  
4 violations. *Cf. SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972)  
5 (noting, in the context of securities violations, that “[t]he critical question for a  
6 district court in deciding whether to issue a permanent injunction . . . is whether  
7 there is a reasonable likelihood that the wrong will be repeated”).<sup>9</sup> As a result, the  
8 failure of a plaintiff to obtain (or even seek) an injunction does not preclude it from  
9 bringing suit for *later* instances of similar unlawful conduct.

10 Finally, we reject Giftports’s policy argument – that if we decline to find claim  
11 preclusion here, we will encourage seriatim lawsuits. A putative defendant is  
12 protected from seriatim lawsuits through the ordinary operation of claim preclusion,  
13 issue preclusion, and settlement. First, claim preclusion principles incentivized  
14 TechnoMarine to bring all of its causes of action involving the same transaction or  
15 connected series of transactions and arising *before* commencement of its first  
16 litigation in that first suit, and prohibited it from splitting these causes of action into

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1 <sup>9</sup> A plaintiff may also elect not to seek an injunction because he reasonably assumes  
2 the defendant will comply with the law going forward.

1 multiple suits. But TechnoMarine did not bring suit, and could not have done so,  
2 for causes of action that had not yet arisen. Second, if Giftports had litigated the  
3 previous action until final judgment and obtained a favorable determination  
4 regarding the legality of its conduct, absent a crucial intervening change of  
5 circumstances, issue preclusion would have precluded TechnoMarine from litigating  
6 again the issue of whether Giftports's course of conduct was lawful. Similarly, in  
7 the Settlement Agreement resolving the first litigation, Giftports could have  
8 expressly resolved claims over future conduct. Our decision today thus in no way  
9 opens the door to seriatim lawsuits. We merely hold, in accordance with well-  
10 settled precedent, that TechnoMarine's earlier settlement does not preclude it from  
11 bringing later claims over new conduct giving rise to causes of action that did not  
12 exist at the time of the settlement.

### 13 III.

14 We next address the district court's alternative holding that TechnoMarine  
15 failed to state a claim. "To survive a motion to dismiss, a complaint must contain  
16 sufficient factual matter, accepted as true, to state a claim to relief that is plausible  
17 on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks  
18 omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not

1 need detailed factual allegations, a plaintiff's obligation to provide the grounds of  
2 his entitlement to relief requires more than labels and conclusions, and a formulaic  
3 recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*,  
4 550 U.S. 544, 555 (2007) (brackets, citations, and internal quotation marks omitted).

5 The district court reviewed each of Plaintiff's claims and the facts alleged in  
6 its complaint and determined that TechnoMarine failed plausibly to plead its claims  
7 for trademark infringement, false designation of origin, trademark dilution, tortious  
8 interference, unfair competition, or copyright infringement. We have undertaken  
9 an independent review, and find no error in the district court's analysis.  
10 TechnoMarine's complaint did not permit the district court to "draw the reasonable  
11 inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at  
12 678, and accordingly, Plaintiff has not raised its "right to relief above the speculative  
13 level," *Twombly*, 550 U.S. at 555. We therefore affirm the district court's dismissal  
14 of plaintiff's First Amended Complaint for failure to state a claim.

15 TechnoMarine argues, finally, that the district court's denial of its request for  
16 leave to amend its complaint should be reversed. The district court denied plaintiff  
17 leave to amend on the grounds that curing its substantive pleading deficiencies  
18 would be futile in light of the *res judicata* bar. As we have made clear, *res judicata*



1 does not bar (at a minimum) TechnoMarine’s trademark infringement claim. We  
2 nonetheless affirm the district court’s denial of leave to amend because  
3 TechnoMarine has not indicated how it could cure its pleading deficiencies.

4 Under Rule 15(a), “leave to amend ‘shall be freely given when justice so  
5 requires.’” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)  
6 (quoting Fed. R. Civ. P. 15(a)). “We review a district court’s denial of leave to  
7 amend for abuse of discretion, unless the denial was based on an interpretation of  
8 law, . . . in which case we review the legal conclusion *de novo*.” *Panther Partners Inc.*  
9 *v. Ikanos Commc’ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012). Leave may be denied “for  
10 good reason, including futility, bad faith, undue delay, or undue prejudice to the  
11 opposing party.” *McCarthy*, 482 F.3d at 200 (citing *Foman v. Davis*, 371 U.S. 178, 182  
12 (1962)).

13 A plaintiff need not be given leave to amend if it fails to specify either to the  
14 district court or to the court of appeals how amendment would cure the pleading  
15 deficiencies in its complaint. *See, e.g., City of Pontiac Policemen’s & Firemen’s Ret. Sys.*  
16 *v. UBS AG*, 752 F.3d 173, 188 n.71 (2d Cir. 2014) (denying leave to amend where  
17 “plaintiffs have identified no additional facts or legal theories – either on appeal or  
18 to the District Court – they might assert if given leave to amend”); *Porat v. Lincoln*

1     *Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006) (per curiam) (“A counseled  
2     plaintiff is not necessarily entitled to a remand for repleading whenever he has  
3     indicated a desire to amend his complaint, notwithstanding the failure . . . to make  
4     a showing that the complaint’s defects can be cured.”); *Hayden v. Cnty. of Nassau*, 180  
5     F.3d 42, 53-54 (2d Cir. 1999) (“[W]here the plaintiff is unable to demonstrate that he  
6     would be able to amend his complaint in a manner which would survive dismissal,  
7     opportunity to replead is rightfully denied.”). Moreover, even where a legal error  
8     undergirds a district court’s decision to deny leave to amend, this Court can affirm  
9     the denial of leave on alternate grounds. See *Hutchison v. Deutsche Bank Sec. Inc.*, 647  
10     F.3d 479, 491 (2d Cir. 2011) (affirming despite the fact that the court could not  
11     “affirm the denial of Plaintiffs’ motion to amend on the futility ground cited by the  
12     district court,” because amendment would be futile for other reasons); *AEP Energy  
13     Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 726-27 (2d Cir. 2010).

14             Here, Plaintiff already amended its complaint once following Defendant’s first  
15     motion to dismiss for failure to state a claim. TechnoMarine failed to resolve its  
16     pleading deficiencies in its First Amended Complaint. In its request to amend this  
17     complaint below and in its brief here, moreover, TechnoMarine has entirely failed  
18     to specify how it could cure its pleading deficiencies. We therefore affirm the

1 district court's denial of Plaintiff's request further to amend the complaint and its  
2 decision to grant the motion to dismiss with prejudice. *See Porat*, 464 F.3d at 276.

### 3 CONCLUSION

4 To summarize: TechnoMarine's complaint, contrary to the district court's  
5 determination, is not barred *in toto* by claim preclusion. We nonetheless affirm the  
6 district court's grant of Giftports's motion to dismiss based on the district court's  
7 alternative holding that the complaint fails to state a claim upon which relief may  
8 be granted. As for TechnoMarine's request to amend, although amendment would  
9 not be futile on claim preclusion grounds, TechnoMarine failed both in the district  
10 court and on appeal to specify how a second amendment would allow it to cure its  
11 pleading deficiencies. Accordingly, we affirm the district court's denial of  
12 TechnoMarine's request for leave to amend.

13 For the foregoing reasons, the judgment of the district court is hereby  
14 AFFIRMED.